

**Oneida Nation  
Legislative Reference Office**

Krystal L. John, Staff Attorney  
Douglass A. McIntyre, Staff Attorney  
Taniquelle J. Thurner, Legislative Analyst  
Maureen Perkins, Legislative Analyst



P.O. Box 365  
Oneida, WI 54155  
(920) 869-4376  
(800) 236-2214  
<https://oneida-nsn.gov/Laws>

**Memorandum**

**TO:** Legislative Operating Committee  
**FROM:** Douglass A. McIntyre, Staff Attorney  
**DATE:** May 18, 2016  
**RE:** Back Pay Amendments: Public Meeting Comment Review

---

On May 5, 2016, a public meeting was held regarding a proposal to amend an existing law: the Back Pay. These amendments would:

- Clarify that Back Pay is a law and adjust the format accordingly;
- Clarify the definition of back pay is to "make the employee whole". [see 306.3-1(b)];
- Clarify that reinstatement of insurance benefits includes long-term disability, short-term disability, dental, vision and life insurance. [see 306.4-1(g)(1)];
- Include OBC or GTC directives for increase in pay into the back pay amount awarded. [see 306.4-1(e)]; and
- Require a reinstated employee to work with Oneida Contract Health to determine if services were rendered and if insurance can retroactively recoup funds to Oneida Contract Health. [see 306.4-1(g)(1)(B)].

This memorandum is submitted as a review of the comments received during the public comment process including at the public meeting and those comments received before the comment period ended on May 12, 2016. The public meeting draft with comments, as well as the transcripts and written comments received, have been attached for your review.

**Comments 1& 2. Definition.**

**Comment 1. Rena Metoxen** (written):

One of the proposed amendments to the policy is to "**Clarify the definition of back pay to make the employee whole**." If that was the true intent of the amendment, our office would wholeheartedly agree. To "**make whole**" is to **make payment or award sufficient to put the party who was harmed back into the position he/she would have been without the fault of another.**"

The proposed Back Pay Policy, 306.3 Definitions, (b) reads: "Back pay" means money damages owed to the Employee for a salary or wage to make the employee whole **as determined by the formula set forth within the law.**" (emphasis added).

Therein, lies the problem and the contradiction. **The employee cannot be made whole if we use the formula described in the policy.**

**Comment 2. Rena Metoxen (written):**

That is why the policy is contradictory. It claims that it's making the employee whole **as determined by the calculations contained in the policy**. Either we are making the employee whole by giving him back pay that he would have earned if he had not been suspended, or we are calculating back pay according to the formula in the policy. Either/or. We can't do both. That is why the policy is contradictory. It uses both scenarios in the same sentence when it reads that "back pay is money damages owed to the employee for a salary or wage to make the employee whole as **determined by formulas set forth within this policy.**"

*Response.*

In the table below are the current definition of back pay and the proposed revision.

<b>Current Law</b>	<b>Proposed Amendments</b>
(b) "Back pay" shall mean money damages owed to the Employee for a salary or wage that would have been earned in the time taken to litigate the employment dispute, minus amounts that are deducted from salary or income earned from a third-party employer or limited by other law of the Tribe.	(b) "Back pay" <del>shall mean</del> <u>means</u> money damages owed to the Employee for a salary or wage <del>that would have been earned in the time taken to litigate to make the employee whole as determined by the employment dispute, minus amounts that are deducted from salary or income earned from a third party employer or limited by other law of the Tribe.</del> <u>formulas set forth within this law.</u>

This revision was requested to remove the formula from the current definition since the formulas used to calculate back pay are found elsewhere in the body of the law, these formulas are different and the formula is not needed in the definition. The definition of back pay reads "to make the employee whole *as determined by the formulas set forth within this law.*" There is no contradiction here as the amount that is needed to make the employee whole is determined by the formulas found within the law. However, to avoid confusion, the LOC may want to consider revising the language to remove "make whole" from the law. A potential revision could be:

(b) "Back pay" ~~shall mean~~s money damages owed to the ~~E~~employee for a salary or wage ~~that would have been earned in the time taken to litigate the employment dispute, minus amounts that are deducted from salary or income earned from a third party employer or limited by other law of the Tribe~~ to compensate the employee as determined by the formulas set forth within this law.

**Comment 3. General - Section 306.4-3(b)(2)**

**Rena Metoxen (written):**

If back pay is truly intended to make the employee whole, it should be calculated according to the individual employee's regularly scheduled days and wages and the employee should be paid accordingly.

*Response*

This comment reflects the general basis of the comments pertaining to this section. There are no recommended changes based on this comment. Potential changes to the section are discussed later in this memorandum.

**Comment 4. Application - Section 306.4-3(b)(2)**

**Rena Metoxen (written):**

Please refer to Back Pay Policy 306.4-3 Back Pay Period (52) (2) "If the involuntary separation period involves a fractional week, the indemnity shall be paid for each day of such week at the rate of one-sixth (1/6) of the weekly indemnity." In other words, according to this formula, if an employee is suspended for less than 7 days, this is the formula used to calculate their back pay.

*Response*

The commenter is correct that section 306.4-3(b)(2) would be used where an employee were to be suspended for less than a seven (7) day period. It would also be used where an employee is suspended for a longer period of time involving a fractional week. There are no recommended changes from this comment. Potential changes to the section are discussed later in this memorandum.

**Comment 5. Parallels to Worker's Compensation Law - Section 306.4-3(b)(2)**

**Rena Metoxen (written):**

**Please refer to the Oneida Worker's Compensation Law, 13.6-6 (b) "Employee's Average Daily Wage. If the disability period involves a fractional week, the indemnity shall be paid for each day of such week at the rate of one-sixth of the weekly indemnity."**

Does that sound familiar? It is the exact same computation that's been incorporated into the Back Pay Policy. Worker's Comp is designed to only pay a portion of the worker's average wage. It is not intended to make the employee whole. Back pay and Worker's Comp are two separate and distinct entities. It is unfair and unreasonable to use the same formula to calculate both.

*Response.*

The commenter is correct that the language used that section 13.6-6(b) of Worker's Compensation parallels the language used in the section 306.4-3(b)(2) of Back Pay. This language was added in the 2014 amendments to Back Pay based on input from the Finance Department. The reasoning behind this amendment was to create a consistent ratio for all employees and payment types given wide range of these found in the Tribe. There are no recommended changes from this comment. Potential changes to the section are discussed later in this memorandum.

**Comment 6. Blue Book - Section 306.4-3(b)(2)**

**Rena Metoxen (written):**

Also, the Tribe's Employee Manual, Section V.D. 6, 3.c, describes an Area Manager's options when issuing a decision regarding an employee appeal, which includes "Overturn the disciplinary action. If a suspension or termination is overturned, the employee (petitioner) shall

be reinstated with **full back pay.**" (emphasis added) The Manual does not allow for a formula for fractional weeks at the rate of 1/6 of the weekly indemnity.

Employee Manual also describes a work day as follows:

Work Day:

- 3.2 The regular Tribal workday is from 8:00 am to 4:30 pm with an hour for lunch.
  - 3.2.1 The exception to these hours occurs only if the program/enterprise hours must vary for the purposes of providing service (such as Retail and Gaming Division's hours beyond 4:30pm). Shifts will be developed as needed and the shift hours will then become the regular

In many cases, for many reasons, program/enterprise hours and schedules vary and those shift hours become the employees regularly scheduled work days. It is unfair and unreasonable to calculate every Tribal employee's back pay that includes a fractional week, according to the Worker's Compensation formula contained in our current Back Pay policy and again in the proposed policy.

*Response*

Back pay appears in the Nation's Personnel Policies and Procedures twice.

<p>(V)(D)(5) reads:</p> <p>f. Should a disciplinary action result in the suspension or termination of an employee, the following guidelines shall apply:</p> <ul style="list-style-type: none"><li>1) The supervisor shall consult with the HRD Manager to mutually determine the length of the suspension.<ul style="list-style-type: none"><li>a) Suspensions will be limited to a maximum of three (3) weeks.</li><li>b) Suspension/terminations that are overturned in the appeal process shall result in the employee receiving back pay for the days he/she was suspended/terminated.</li></ul></li></ul>	<p>(V)(D)(6)(a)(3) reads:</p> <p>3) The Area Manager will do one of the following:</p> <ul style="list-style-type: none"><li>a) Uphold the disciplinary action; or</li><li>b) Modify the disciplinary action; or</li><li>c) Overturn the disciplinary action. If a suspension or termination is overturned, the employee (petitioner) shall be reinstated with full back pay.</li></ul>
---	---

Given the complexity of the issue as the Nation has a range of employee and payment types (including salaried/hourly employees, employees with varying shift days and hours, tips/non-tipped, etc.) the Back Pay Policy was created to provide a consistent and standard procedure for the management of employee back pay. There are no recommended changes based on this comment. Potential changes to the section are discussed later in this memorandum.

**Comments 7 & 8. Fractional Formula - Section 306.4-3(b)(2)**

**Comment 7. Patricia Campbell** (written): The only thing I disagree with the Back Pay Policy is:

306.4-3. Back Pay Period. (b) 2. If the involuntary separation period involves a fractional week, the indemnity shall be paid for each day of such week at the rate of one-sixth (1/6) of the weekly indemnity.

Most employees do not work 6 days a week. In order to truly 'make an employee whole', I believe you need to:

1. Actually pay them the amount of hours they missed multiplied by their hourly rate at the time of the incident, or
2. Use the average weekly rate and divide that rate by the number of days the employee actually works (hardly no one works 6 days a week) or

In Gaming some employees work 4-ten hour days, some work 5-eight hour days, some work a 30 hour week, or less.

So, for example: an employee's average weekly rate is \$500.00 and you divide that by 1/6, as the Back Pay Policy now does, the employee would get \$83.33 per day. If the employee is eligible for 2 days of back pay the employee gets \$166.66. But, if the employee missed 2-ten hour days, that would be 1/2 (20 of 40 hours) of their work week, and they would still only get 2/6 of their pay for the week, when they deserve \$250.00 to 'be made whole'.

I believe the policy as its worded now hurts most Gaming employees, and does not make them whole.

**Comment 8. Rena Metoxen** (written): It has been my experience, as a tribal employee advocate for over 20 years; that the majority of suspension are issued to front line employees for 7 days or less. Therefore, this formula would be applicable to the majority of Tribal employee suspensions. It doesn't matter if the employee's regularly scheduled hours are five, 8-hours days per week or four, 10 hour days per work. Their weekly work hours are divided by 6, as if they work 6 days per week, and they are paid accordingly. That is what this policy mistakenly describes as "making an employee whole."

Here's an example of an overturned suspension where the employee is made whole:

- Employee receives a one day suspension.
- That suspension is appealed and overturned
- Employee earns \$10 per hour
- Employee is scheduled to work four 10-hour days per week.
- Employee earns \$100 per day or \$400 per week.
- Employee receives \$100 in back pay for 1 day of back pay.

According to the formula used in both the existing policy and the proposed policy, it doesn't matter if the employee works two 20-hour days per week or five 8-hours days per week; the fractional work week hours are divided by 6 days and that's the back pay.

Using the example above, here is how the same employee receives back pay according to the existing policy AND the proposed policy:

- Employee receives a one day suspension.
- That suspension is appealed and overturned.
- Employee earns \$10 per hour
- Employee is scheduled to work four 10-hour days per week.
- Employee earns \$100 per day or \$400 per week.
- The employee's fractional work week of 4-day/40 hour is divided by 6.
- Employee receives \$66 and some change.

How is that making the employee whole?

*Response.*

The commenters request a new formula for section 306.4-3(b)(2). The language in this section is in the current law and there were no proposed changes in the public meeting draft. As stated above, this language parallels a similar provision in the Worker's Compensation Law. The language was changed as part of the 2014 amendments to create a consistent ratio for all employees and payment types.

Both the current 2014 version and prior 2010 version of the law are in the table below for reference:

<b>2010 version of Back Pay</b>	<b>2014 version of Back Pay</b>
<p>4-1. <i>Back Pay Period.</i> Calculation of back pay begins on the day the employee is suspended or terminated and ends on the day the employee returns to work, due to either the end of the suspension period or reinstatement.</p> <p>(a) If the employee is offered reinstatement but refuses to return to work, the back pay period ends on the date the offer of reinstatement was made.</p> <p>(b) The employee shall be paid according to the schedule or the average number of hours worked immediately prior to suspension or termination. For instance, if the employee observed a reduced-hour schedule at the time of termination, back pay shall be calculated according to the same schedule.</p>	<p>4-3. <i>Back Pay Period.</i> Calculation of back pay begins on the day the employee is involuntarily separated and ends on the day the employee is reinstated.</p> <p>(a) If the employee is reinstated but refuses to return to work, the back pay period ends on the date reinstatement would have taken effect, but was refused by the employee.</p> <p>(b) Back pay shall be calculated by taking the employee's earnings during the fifty-two (52) week period immediately preceding the date of the involuntary separation and divide that amount by the number of weeks worked.</p> <p style="padding-left: 40px;">(1) If the employment prior to the involuntary separation was less than fifty-two (52) weeks,</p>

	<p>the average weekly wage shall be calculated by taking the employee's earnings and divide that amount by the number of weeks worked.</p> <p>(2) If the involuntary separation period involves a fractional week, the indemnity shall be paid for each day of such week at the rate of one-sixth (1/6) of the weekly indemnity.</p>
--	--

The commenters each provide examples to support their notion that employees that are owed back pay involving a fractional week are not being fairly compensated. The examples involve simple cases where an employee is suspended for one day which causes the employee to miss a scheduled shift. However, the fractional back pay formula would be used for all back pays involving a fractional week including ones where the employee has no hours scheduled. One of the commenters provides suggested changes:

1. Actually pay them the amount of hours they missed multiplied by their hourly rate at the time of the incident, or
2. Use the average weekly rate and divide that rate by the number of days the employee actually works (hardly no one works 6 days a week) or

There are some potential issues with these suggested changes. The first suggested change could only be applied to employees that already had a set schedule. The second suggested change could face issues where employees work varying scheduled days. Other potential options would be a formula containing the average weekly hours

Any change to the formula would be a policy decision for the LOC. It is recommended that the LOC direct the LRO to create several potential options and to bring back to the LOC.

**Conclusion**

There were no comments provided at the public meeting and multiple comments provided in writing which the LOC should consider and incorporate as appropriate. It is recommended that these comments be reviewed at a LOC meeting. An invitation was provided to the interested parties to review the comments and provide direction to any changes necessary based on the comments.